March 5, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Las Vegas Review-Journal
Dates of Filing:	December 11, 2002 December 30, 2002
Case Numbers	TFA-0007 TFA-0014

This Decision concerns two Appeals that were filed by The Las Vegas Review-Journal, a newspaper, from determinations that were issued to it by the Department of Energy's (DOE) Office of Civilian Radioactive Waste Management (Yucca Mountain) (Case No. TFA-0007) and by the Office of Inspector General (OIG) (Case No. TFA-0014). These determinations were issued in response to a request for information that the newspaper submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. The Appeal, if granted, would require that documents that these offices withheld in whole or in part be released, and that a new search for responsive documents be performed.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE's regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. Background

In its FOIA request, The Review-Journal sought access to copies of all documents pertaining to (i) a settlement between Science Applications International Corporation (SAIC) and Mactec Inc., including the settlement agreement, (ii) the terms of the settlement agreement in *Mitchell v. Mactec* and the billing, payment and reimbursement of litigation fees in that case, (iii) the contracting of the Morgan, Lewis & Bockius law firm to conduct the Safety Conscious Work Environment (SCWE) Investigation and the firm's final report, and (iv) how two specified employee concerns were addressed. The newspaper also requested a copy of a May 18, 2001 letter from James Mattimoe to Lake Barrett and related documents concerning

allegations of corruption in investigations conducted by the Yucca Mountain Concerns Program, six pieces of correspondence sent by Kristi Hodges to the OIG between October 2001 and January 2002, and Department of Labor communications pertaining to an investigation into an allegedly wrongful termination.

In its determination (Case No. TFA-0007), Yucca Mountain released a number of responsive documents to the newspaper. However, Yucca Mountain withheld other documents, in whole or in part, under Exemptions 4, 5, and 6 of the FOIA, 5 U.S.C. § 552(b)(4), (b)(5) and (b)(6), respectively. Yucca Mountain further determined that no documents pertaining to any settlement between SAIC and Mactec or correspondence between Kristi Hodges and OIG could be located in Yucca Mountain's records. Yucca Mountain referred the request for correspondence between Hodges and the OIG to that Office. As a result of this referral, OIG issued a Glomar response to the newspaper (Case No. TFA-0014). [1]

In its Appeals, The Review-Journal contests the withholding of documents pertaining to the settlement reached in the *Mitchell v. Mactec* litigation. The newspaper has also submitted releases signed by Hodges and two other individuals authorizing OIG to release the Hodges correspondence and Yucca Mountain to release information pertaining to the others that it withheld pursuant to Exemption 6. The Review-Journal further contends that the search for documents pertaining to any settlement between SAIC and Mactec was inadequate, and that the Yucca Mountain authorizing official who issued the determination in Case No. TFA-0007 should have recused himself because many of the documents requested involve him.

II. Analysis

A. Applicability of Exemptions 4 and 5

In its determination, Yucca Mountain withheld in their entirety legal bills in the *Mitchell v. Mactec* litigation that were submitted to the DOE for reimbursement and the settlement agreement in that litigation under Exemption 4. That Exemption shields from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order to qualify under Exemption 4, a document must contain either (a) trade secrets or (b) information which is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Yucca Mountain found that the withheld documents are commercial in nature and consist of privileged attorney-client communications and attorney work product.

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[1] In a Glomar response, the responding office neither confirms nor denies the existence of the documents sought, on the grounds that the mere acknowledgment of the existence of the documents could itself reveal information that the FOIA permits an agency to protect. The term "Glomar" refers to the first instance in which a federal court upheld the adequacy of such a response. *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (responding to a request for documents pertaining to a submarine retrieval ship named the Hughes Glomar Explorer by neither confirming nor denying the existence of such documents).

Yucca Mountain also withheld Attachment 3 of the SCWE Final Report in its entirety, and portions of the main body of that Report and of Attachment 2, along with the portions of its contract with Morgan, Lewis & Bockius that would reveal the hourly rates paid to the firm for producing the Report. Yucca Mountain concluded that this information consists of privileged attorney-client communications and attorney work product "that is not 'routinely' or 'normally' available to parties in litigation and, therefore, is exempt in its entirety under Exemption 5." Determination letter at 5.

Exemption 5 allows agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This Exemption is generally recognized as encompassing the attorney-client, attorney work product and governmental deliberative process privileges. *See*, *e.g.*, *Coastal States Gas Corp. v. DOE*, 617 F.2d 854 (D.C. Cir. 1980) (*Coastal States*). As previously stated, Yucca Mountain relied upon the attorney-client and attorney work product privileges encompassed by both Exemptions 4 and 5.

The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *In Re Grand Jury Proceedings 88-9 (MIA)*, 899 F.2d 1039 (11th Cir. 1990). Not all communications between attorney and client are privileged, however. The courts have limited the protection of the privilege to those disclosures necessary to obtain or provide legal advice. Accordingly, the privilege does not extend to social, informational, or procedural communications between attorney and client.

The attorney work product privilege protects from disclosure documents which reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). This privilege is applicable to documents that were prepared by an attorney "in contemplation of litigation." *Coastal States* at 864.

It is well settled that attorney fee information is generally not privileged. *See, e.g., Clark v. American Commerce National Bank*, 974 F.2d 1039 (9th Cir. 1992) (*Clark*); *United States v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *Indian Law Resource Center*, 477 F. Supp. 144, 147 (D.D.C. 1979). However, in those cases where a party has been able to show that the attorney billing statements at issue reveal litigation strategy, substantive communications or the specific nature of the services provided by the attorneys, such as research into particular areas of the law, courts have found them to be privileged. *Clark*, 974 F.2d at 129. Accordingly, we have held that information in expense records pertaining to the total amount charged by a law firm in a particular litigation, the attorneys' identities, their hourly rates, and the costs of travel, reporting services and document reproduction are generally not exempt from disclosure pursuant to the attorney-client or attorney work product privileges. *See, e.g., William H. Payne*, 26 DOE ¶ 80,161 (1997); *C.D. Varnadore*, 24 DOE ¶ 80,123 (1994). Information that could reveal the litigation strategy, thoughts or impressions of the attorneys, however, such as dates and descriptions of the specific services provided and the monthly and daily totals of hours billed by each attorney, is protected from mandatory disclosure under these privileges. Id.

Applying these principles to the present case, we find that some of the withheld material is not subject to the attorney-client or attorney work product privileges. This non-exempt material includes information pertaining to the legal expenses charged in the *Mitchell v. Mactec* litigation, and pertaining to the attorneys' identities and hourly rates in documents concerning the contracting of the Morgan Lewis Bockius law firm to conduct the SCWE investigation. Based on the record before us, we cannot conclude that release of this information would reveal litigation strategy or the mental impressions, conclusions, or legal theories of the attorneys involved.

However, we find that Yucca Mountain correctly concluded that the settlement agreement in *Mitchell v. Mactec* and information reflecting the settlement amount or other terms of the agreement are attorney work product, and therefore exempt from mandatory disclosure. The federal courts have held that information prepared by attorneys "in contemplation of litigation," *Coastal States* at 864, includes documents relating to possible settlements of litigation. *See, e.g., United States v. Metropolitan St. Louis Sewer District,* 952 F.2d 1040, 1045 (8th Cir. 1992). The courts have also recognized a separate civil discovery privilege for information relating to settlement negotiations. *See, e.g., Olin Corp. v. Insurance Co. of North America,* 603 F. Supp. 445, 449 (S.D.N.Y. 1985). The OHA has also determined that settlement documents are privileged and therefore exempt from mandatory disclosure. *Information Focus on Energy,* 26 DOE ¶ 80,192 (1997) (*IFOE*); *Peter T. Torell*, 15 DOE ¶ 80,127 (1987). In reaching these determinations, we have concluded that the privilege exists, in large part, to encourage full disclosure between the parties involved in order to promote settlements rather than continued litigation. *IFOE.* We therefore conclude that Yucca Mountain properly withheld information relating to the settlement in *Mitchell v. Mactec.* Consequently, we will remand this matter to Yucca Mountain. On remand, Yucca Mountain should either release information pertaining to the legal expenses charged in the *Mitchell v. Mactec* litigation, and pertaining to the attorneys' identities and hourly rates in documents concerning the contracting of the Morgan Lewis Bockius law firm to conduct the SCWE investigation, or adequately justify withholding the information under another provision of the FOIA.

B. Exemption 6

In its determination, Yucca Mountain also withheld information pursuant to Exemption 6 of the FOIA. Specifically, Yucca Mountain withheld portions of: (i) Attachment 2 of the SCWE Final Report; (ii) a May 18th, 2001 letter and attachments from James Mattimoe to Lake Barrett; (iii) three memoranda from "L.H. Barrett," dated January 10, March 22, and April 30, 2002; (iv) a fourth memorandum, undated, from "L.H. Barrett" to N.A. Voltura; (v) a memorandum from A. K. Walter to "Director OCRWM" dated November 17, 1999; and (vi) an enclosure dated March 3, 2000, to a letter from R.L. Toft to I. Itkin dated March 14, 2002.

Exemption 6 shields from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (*Washington Post*). Furthermore, the term

"similar files" has been interpreted broadly by the Supreme Court to include all information that "applies to a particular individual." *Washington Post*, 456 U.S. at 602. Accordingly, Yucca Mountain withheld portions of the documents described above because it concluded that release of the information "would constitute a clearly unwarranted invasion of personal privacy interests." Determination letter at 4. Similarly, OIG neither confirmed nor denied the existence of the Kristi Hodges correspondence because "[l]acking an individual's consent . . ., even to acknowledge the existence of such records pertaining to an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy." OIG determination letter at 1.

As previously mentioned, The Review-Journal's Appeal in Case No. TFA-0007 included releases signed by James Mattimoe, the former Quality Assurance Manager for a DOE contractor, and Robert Clark, DOE's Quality Assurance manager for the Yucca Mountain Project. Each release authorizes Yucca Mountain to "disclose all quality assurance documents pertaining to [the subject's] correspondences . . . from 1999 to 2002 whether or not protected by the Privacy Act, the Freedom of Information Act, or any Department of Energy regulations or instructions," to the newspaper. Mattimoe and Clark releases at 1. Similarly, The Review-Journal has submitted, in conjunction with its Appeal in Case No. TFA-0014, a release signed by Kristi Hodges, which authorizes OIG "to disclose all six correspondences that were sent to that Office by [Hodges] between October 2001 and January 2002, whether or not protected by the Privacy Act, Freedom of Information Act, or any Department of Energy regulations or instructions," to the newspaper. Hodges release at 1.

Although these releases appear to adequately address Yucca Mountain's and OIG's privacy concerns, we will remand these matters to those Offices so that they may consider the releases for the first time. On remand, Yucca Mountain and OIG should review the releases and determine what effect those documents have on those Office's initial determinations. [2]

C. Adequacy of the Search

The Review-Journal further alleges that a document obtained from "other sources" indicates "that there were several corrective action reports that Yucca Mountain should have provided in response to the original request for 'all records, notes, letters, invoices and memorandums . . . pertaining to a settlement between the Department of Energy's Yucca Mountain project coordinator, SAIC, and subcontractor Mactec, Inc. of Golden, Colorado.'" Review-Journal Appeal at 1. According to the newspaper, these reports are LVMO-98-C-002, -005, -006, -010 and -101.

[2] In view of our decision to remand this matter to OIG, we need not determine whether their issuance of a Glomar determination was appropriate in this case. However, we note that not all correspondence to that Office raises the types of privacy interests that such a determination is designed to protect.

Yucca Mountain has informed us that it did not consider these documents to be responsive to The Review-Journal's request, and therefore did not process them under the FOIA. However, Yucca Mountain has agreed that, on remand, it will review these documents for possible release to the newspaper. *See* memorandum of February 7, 2003 telephone conversation between Robert Palmer, OHA Staff Attorney, and Diane Quenell, Yucca Mountain. We therefore need not address The Review-Journal's contention that the documents should have been provided in response to the newspaper's original request. The newspaper may request our review of the Yucca Mountain action in the event any portion of those documents are withheld.

D. Recusal of the Authorizing Official

The Review-Journal's final contention is that the authorizing official who issued the determination letter in Case No. TFA-0007 should have recused himself because many of the documents sought by the newspaper involve that official. However, the Review-Journal does not cite any part of the FOIA or of the DOE regulations, or any decision of a federal court or of this Office, requiring such a result. As a practical matter, a recusal requirement of the DOE would often prove unworkable, since documents requested under the FOIA often involve, in one way or another, most if not all of the employees of the office from which the documents are sought. We therefore reject The Review-Journal's contention that the authorizing official should have recused himself.

E. Conclusion

For the reasons set forth above, we will remand Case Nos. TFA-0007 and TFA-0014 to Yucca Mountain and OIG, respectively. On remand, Yucca Mountain shall review the material that it withheld under Exemptions 4 and 5 (with the exception of the settlement agreement in *Mitchell v. Mactec*) under the guidelines set forth in section II.A of this Decision. Furthermore, Yucca Mountain should review corrective action reports LVMO-98-C-002, -005, -006, -010 and -101 for possible release to The Review-Journal under the FOIA. Finally, Yucca Mountain and OIG should review the releases submitted by the newspaper, make findings as to the effects of those releases on their original determinations, and issue revised determinations to The Review-Journal. Each new determination by Yucca Mountain and OIG is subject to being reviewed on appeal to this Office.

It Is Therefore Ordered That:

(1) The Appeals filed by The Las Vegas Review-Journal on December 4, 2002 (TFA-0007) and December 30, 2002 (TFA-0014) are hereby granted as set forth in paragraph (2) below.

(2) These cases are hereby remanded to the Office of Civilian Radioactive Waste Management and the Office of Inspector General, respectively, for further proceedings consistent with the guidelines set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 5, 2003